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No.

Supreme Court, U.S.
FILED

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Supreme Court of the United States

OFFICE OF THE CLERK

October Term, 1995

ROSEANN CLARK and JOSEPH CLARK, and INFANT NICHOLAS CLARK and MICHAEL CLARK, by their mother, ROSEANN CLARK,

Petitioners,

against

CLARKSTOWN CENTRAL SCHOOL DISTRICT, and HELEN O'CONNOR, individually and in her official capacity as an employee of the CLARKSTOWN CENTRAL SCHOOL DISTRICT, ARCHDIOCESE OF NEW YORK, ST. AUGUSTINE SCHOOL, HELEN BOYCHAK as Principal of St. Augustine School, and as employee of ARCHDIOCESE OF NEW YORK,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether the Writ of Certiorari should be granted where the Courts below entirely ignored the circumstance that Petitioners demonstrated that they had a constitutionally protected liberty interest, entitling them to be free from unreasonable and unwarranted child abuse investigations, and that this liberty interest was violated by the initiation of such the investigation without the necessary prerequisite of "reasonable cause" to suspect that Petitioners' children were abused.

Petitioners contend that this question should be answered in the affirmative.

Table of Contents

Page

Question Presented i

Opinions Below 3

Jurisdiction 3

Statutory Provisions Involved 4

Statement of the Case 4

REASON FOR GRANTING THE PETITION:

I. The Writ of Certiorari should be granted where the Courts below entirely ignored the circumstance that Petitioners demonstrated that they had a constitutionally protected liberty interest, entitling them to be free from unreasonable and unwarranted child abuse investigations, and that this liberty interest was violated by the initiation of such the investigation without the necessary prerequisite of "reasonable cause" to suspect that Petitioners' children were abused 9

Conclusion 24

Index to Appendix

Page

APPENDIX A—Order of the United States Court of Appeals For the Second Circuit 1a

APPENDIX B—Order of the United States District Court For the Sourthern District of New York 6a

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES:

Canton v. Harris, 489 U.S. 378 (1989) 21

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 2

Emrik v. Chemung County Dept. of Social Serv., 911 F.2d 863, 865 (2d Cir. 1990) 14, 15

Fiacco v. City Rensselaer, 783 F. 2d 319 (2nd Cir. 1986) 22

Hall v. Davis, 424 U.S. 693 (1976) 17

Hewitt v. Helms, 459 U.S. 460 (1983) 16

Hodge v. Ruperto, 739 F.Supp. 873 (S.D.N.Y. 1990) 21

Hodgson v. Minnesota, 497 U.S. 417, 447 (1990) 14

Kentucky Department of Corrections v. Thompson, 490 U.S. 454 (1989) 12, 18

Monell v. Department of Social Service, 436 U.S. 658 (1978) 21

Parham v. J.R. et al., 442 U.S. 584 (1979) 15

Policard v. Brettschneider, 1991 WL 87326 (E.D.N.Y.) .. 14

Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944) 15

Schering Corp v. Home Insurance Co., 712 F.2d 4 (2d Cir. 1983) 19

Thomas v. Beth Israel Hospital Inc., 710 F. Supp. 935 (S.D.N.Y. 1989) 23

Valmonte v. Bane, 18 F.3d 992 (2d Cir. 1994) 12, 19

NEW YORK STATE CASES:

Kempster v. Child Protective Services of Suffolk Co., 130 A.D.2d 623 (2d Dept. 1987) 23

Rossignol v. Silvernail, 185 A.D.2d 497 (3d Dept. 1992) 22

Satler v. Larsen, 131 A.D.2d 125 (2d Dept. 1987) 22

Viscaino v. City of New York, 150 A.D.2d 312 (1st Dept. 1989) 23

FEDERAL STATUTES:

18 U.S.C § 1983 2

28 U.S.C. § 1254(1) 4

28 U.S.C. § 1331 6

28 U.S.C. § 1343(3) 6

42 U.S.C. § 1983 ..... 4, 6, 21,22

Federal Rules of Civil Procedure 56(c) 2

NEW YORK STATE STATUTES:

New York Social Services Law § 413 ..... passim

New York Social Services Law § 419 22

No.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ROSEANN CLARK AND JOSEPH CLARK, AND INFANT NICHOLAS CLARK AND MICHAEL CLARK, BY THEIR MOTHER, ROSEANN CLARK,

Petitioners,

against

CLARKSTOWN CENTRAL SCHOOL DISTRICT, AND HELEN O'CONNOR, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS AN EMPLOYEE OF THE CLARKSTOWN CENTRAL SCHOOL DISTRICT, ARCHDIOCESE OF NEW YORK, ST. AUGUSTINE SCHOOL, HELEN BOYCHAK AS PRINCIPAL OF ST. AUGUSTINE SCHOOL, AND AS EMPLOYEE OF ARCHDIOCESE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court to issue a Writ of Certiorari to review an Order of the United States Court of Appeals for the Second Circuit, dated October 13, 1995. A copy of the Order is set forth as Appendix A.

According to the Order, the Second Circuit affirmed a Judgment of the United States District Court for the Southern District of New York (Hon. CHARLES L. BRIEANT,

U.S.D.J.), dated January 31, 1995, which dismissed Petitioners' Complaint alleging that Respondents, singly and severally committed violations of 18 U.S.C. § 1983 and related State claims. A copy of the Judgment is set forth as Appendix B.

Petitioners contend that they have a constitutionally- protected privacy interest under the Ninth and Fourteenth Amendments to the United States Constitution which, as applies to this case, necessarily meant that they should have been found to be free from a child abuse investigation initiated and/or conducted by various of the Respondents.

Moreover, Petitioners submit that the District Court below erred as a matter of law in finding that any of the Respondents had "reasonable cause" to suspect that Petitioners' children were being abused. At the very least, when viewed in a light most favorable to the various Respondents, there were factual disputes as to the issues advanced in the case, the presence of which mandated denial of any motion for summary judgment. See F.R.C.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

While the Second Circuit, on appeal, appeared to acknowledge as correct Petitioners' contention that there exists a "constitutionally-protected liberty interest to be free from child abuse investigations absent 'reasonable cause' to believe that a child is being abused," the Second Circuit found that:

> [Respondent] O'Connor had reasonable cause to report her suspicions of child abuse to her immediate supervisor, [Respondent] Boychak, who then had similar cause to pass on the report to third-party defendant Child Protective Services.

Petitioners submit that the Second Circuit, most respectfully, was in error with respect to whether there existed "reasonable cause" for Respondent O'Connor to have reported her highly dubious suspicions to the Principal of St. Augustine School. Moreover, strictly speaking, Respondent Boychak, the school principal was not Respondent O'Connor's supervisor.

Respondent O'Connor, an employee of the Central School District, was not subordinated to the School, but was assigned as a school nurse to the school by operation of the State Education Law. Respondent O'Connor's immediate supervisor was someone in the main office of the Central School District. At the outset of this application, Petitioners point this error out to this Court as indicative of the need for this Court to review and revise the decision of the Courts below, and that by granting their petition for a Writ of Certiorari, this Court may issue instructions to the Courts below on the need to be sensitive to constitutionally protected liberty interests in child abuse investigations.

Opinions Below

The Order of Court of Appeals which is set forth as Appendix A contains the reasoning of that Court.

The Judgment of the District Court is set forth as Appendix B. The District Court did not file a written opinion.

Jurisdiction

The Order of affirmance in the Court of Appeals was entered on October 13, 1995. According to Rule 13.4 of the United States Supreme Court Rules, this Petition for a Writ of Certiorari, having been filed within 90 days of October 13, 1995, is

timely. Further, this Court's jurisdiction to review this case rests upon 28 U.S.C. § 1254(1).

Statutory Provisions Involved

42 United States Code § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Statement of Case

Petitioners Joseph and Roseann Clark are the parents of two children, Nicholas and Michael. The two children, at all times relevant to this controversy, attended the St. Augustine School, operated by Respondent Archdiocese of New York. Respondent Helen O'Connor was employed by Respondent Clarkstown Central School District as a school nurse, and assigned permanently in that capacity to Respondent St. Augustine School.

On or about September 16, 1991, Respondent O'Connor questioned young Nicholas Clark concerning a black eye. Nicholas told Respondent O'Connor that he sustained the injury while playing football with relatives and a friend while attending a

party on the previous weekend. Respondent O'Connor believed that she remembered that Nicholas' brother Michael had a black eye on April 4, 1991. She seemed to recall that young Michael Clark had told her at the time that he had received the black eye while playing with his cousins from Staten Island. Respondent O'Connor also remembered that on or about June 21, 1991, Michael's teacher had told her that Michael had a handprint on his face. This "remembering" was revealed long after the case had been commenced, during the discovery process. Respondent O'Connor had not actually seen the handprint.

Based solely upon the above, Respondent O'Connor concluded that young Nicholas had been the victim of child abuse and reported her suspicions to the Principal of St. Augustine School, Respondent Helen Boychak. On the following day, September 16, 1991, Respondent Boychak spoke separately with Nicholas Clark and Michael Clark. She advised Respondent O'Connor that both children had stated to her that Nicholas had received the black eye in a football game. At this, neither individual Respondent took any further action on September 16, 1991.

On the following day, September 17, 1991, Respondent O'Connor again approached Respondent Boychak and told her that she "could not rest unless something was done" with respect to the Clark children. Based on this prodding, Respondent Boychak, in the presence of Respondent O'Connor, made a report of official child abuse to Third-party Defendant Department of Social Services, Child Protective Services (hereafter CPS). In the report, Petitioners were directly accused of child abuse.

CPS conducted an investigation of Petitioners' family. An investigator from the agency interviewed both Michael Clark and Nicholas Clark and questioned them about intimate details

of their family. The investigator also examined and took pictures of Nicholas Clark's black eye. Petitioners, themselves, were interviewed by the investigator of CPS and asked intimate details concerning their family life.

At the conclusion of the investigation by CPS, it was determined that the report made by Respondent Boychak at the insistence of Respondent O'Connor was unfounded.

Petitioners were substantially harmed by the unfounded reports of child abuse on the part of Respondents. Petitioners filed a Complaint on or about December 14, 1992 in the Southern District of New York against Respondents Clarkstown Central School District and Helen O'Connor. In the Verified Complaint, Petitioners brought a civil rights action pursuant to 42 U.S.C. § 1983, which also contained pendent state law claims. Jurisdiction over the federal claims was said to exist pursuant to 28 U.S.C. §§ 1331 and 1343(3).

In the Complaint it was alleged that the child abuse investigation of Petitioners was conducted by Respondents in bad faith and with wanton disregard of the rights of Petitioners under both the Federal and New York State Constitutions, as well as the common law of the State of New York.

The basis of the federal claims against Respondents School District and O'Connor were that engaging in a course of conduct to the detriment of Petitioners and their sons, without probable cause and/or reasonable suspicion, and without the benefit of a search warrant, the Respondents, while acting in concert and acting under the color of law, and pursuant to official policy, violated the reasonable expectation of privacy as protected by the Fourth, Fifth, Ninth and Fourteenth Amendments to the U.S. Constitution. Essentially, it was contended by Petitioners that

Respondents, by their invasive behavior, had conducted an illegal search and seizure, thereby causing all Petitioners severe injuries and damages. Respondents' course of conduct also gave rise to a variety of pendent state law claims.

Respondent School District was said to be liable to Petitioners for the conduct of Respondent O'Connor, both directly and under the doctrine of *respondeat superior*. Respondent School District was said to have failed to have properly supervise the actions of its employee, Respondent O'Connor.

On or about April 15, 1993, Respondent School District filed a Third-Party Complaint against Respondent Archdiocese of New York, the St. Augustine School, Helen Boychak, as Principal of the School and employee of the Archdiocese, as well as Third-Party Defendants State of New York, County of Rockland, the Department of Social Services and the Child Protective Services. It should be noted that, subsequently, the Third-Party Defendants State of New York, County of Rockland, the Department of Social Services and the Child Protective Services were separated from this action. Said Third-Party Defendants are no longer part of this controversy.

A period of discovery and deposition taking occurred, during the course of which the following motions were made. On or about August 5, 1994, Respondents Archdiocese, St. Augustine School and Helen Boychak filed a Motion for Summary Judgment requesting the Third-Party Complaint be dismissed against them, together with any cross-claims and counter-claims.

On or about October 4, 1994, Respondent Helen O'Connor filed a Motion for Summary Judgment requesting dismissal of the Verified Complaint and any and all counter-claims and cross-claims against her. On or about October 6, 1994, Respon-

dent School District filed a Motion for Summary Judgment requesting dismissal of the Verified Complaint and any and all counter-claims and cross-claims against it.

Petitioners duly opposed the various motions brought by all of the Respondents and the matter was set down for argument on January 27, 1995 before the Honorable CHARLES L. BRIEANT, District Court Judge. On that date, after hearing arguments from all sides, the Court below orally granted Respondents' Motions for Summary Judgment and dismissed all federal claims against Respondents with prejudice and dismissed the pendent state claims against Respondents without prejudice. A written Order was entered in the Office of the Clerk of the Southern District on January 31, 1995.

Petitioners appealed to the United States Court of Appeals, Second Circuit. There, the judgment was affirmed by Order dated October 13, 1995. The Second Circuit held that the granting of summary judgment to Respondents was correct because of its belief that Respondents' actions were not unreasonable under the circumstances.

Petitioners cannot agree with this decision, and they maintain that the record of this case clearly indicates that there was not "reasonable cause" to believe that their children were abused. Given the very intrusiveness of Respondents' conduct, Petitioners now move for relief before this Court.

REASON FOR GRANTING THE PETITION

I. The Writ of Certiorari should be granted where the Courts below entirely ignored the circumstance that Petitioners demonstrated that they had a constitutionally protected liberty interest, entitling them to be free from unreasonable and unwarranted child abuse investigations, and that this liberty interest was violated by the initiation of such the investigation without the necessary prerequisite of "reasonable cause" to suspect that Petitioners' children were abused.

Petitioners submit that this Court should grant the present Petition for a Writ of Certiorari. They submit that both the Courts below so totally misconstrued Petitioners' constitutionally protected privacy interests under the Ninth and Fourteenth Amendments that only a decision by this Court on the merits would serve to remedy the misstatement of the body of the law on point.

The Court of Appeals below, for example, stated that it agreed with Petitioners as to the fact that they had such a constitutionally protected privacy interest but then completely vitiated the concept by stating that Respondents did have the "reasonable cause" to have acted, despite a clear absence of reasonable cause in the record to suspect that Petitioners' children were so abused. The Court of Appeals stated the following in its opinion:

> According to the [petitioners'] version of the facts, on or about September 16, 1991, O'Connor, a nurse at St. Augustine School, questioned Nicholas Clark, a student at that school, about his black eye. O'Connor seemed to recall that Michael, another of the Clark children, had a

> black eye on April 4 of the same year. She also remembered that on or about June 21 of that year, Michael's teacher had told her that Michael had a handprint on his face. Based on these observations and recollections, O'Connor reported her suspicions of child abuse to [Respondent] Boychak. After speaking separately to the two children -- conversations that yielded no evidence of child abuse -- Boychak made an official report of child abuse to Child Protective Services.

Petitioners submit that an examination of the record in this case reveals that the factual statements contained in the above-cited paragraph cannot be said to have been "[Petitioners'] version of the facts." Respondent O'Connor did not have all of the factual statements mentioned in the above excerpt of the Court of Appeals' decision at her disposal when she decided to make her official report to Child Protective Services. Indeed, many of the Respondent O'Connor's allegations were not only obtained long after her initial complaint, but were also entirely inaccurate.

For example, although she claimed to the contrary, when Respondent O'Connor first made her complaint, she was unaware what Petitioners would refer to as the "handprint" allegation. This allegation, if true, was a significant observation. Respondent O'Connor advanced the claim that Michael Clark's teacher had supposedly observed the handprint on June 21, 1991.

Respondent O'Connor found about the supposed handprint at a date far later than the date she made her complaint, a circumstance which eliminated the "handprint" as a factor to be considered in reckoning whether Respondent O'Connor had

"reasonable cause" to believe that the Clark children were suffering from child abuse.

However, in the record of the case, neither Michael nor Nicholas Clark were ever seen by any teacher to have a "hand-print" on their persons. The teacher supposedly making the allegation, Mrs. Burrill, had never had any contact with either Michael or Nicholas; she had been the teacher of the eldest brother of Michael and Nicholas, Joseph, Jr., several years before.

As to the claim that Michael Clark, the second brother, supposedly had a black eye on April 4, it is clear that at the time that Respondent O'Connor made her complaint, she had no recollection of this occurrence, if it indeed occurred. This Court should be aware that all of the alleged events concerning previous injuries to the Clark children were subsequently manufactured by Respondent O'Connor or by personnel at the school -- her friends -- in order to provide for justification for her baseless allegations against Petitioners. That this is so can be seen even from the cited portion of the Order of the Court of Appeals, which, on its face, appears to suggest the lack of "reasonable cause" in Respondent O'Connor's action, rather than its presence.

The Court of Appeals further stated in its decision as follows:

> Drawing all favorable inferences in favor of the appellants, we cannot say that this conduct was unreasonable. The events must be viewed at the time the investigation was initiated, not after the negative results of the investigation were known. Had an investigation not been undertaken and actual abuse followed, [Respondents] would have received justifiable criticism, if

> not a lawsuit, for not heeding evident warning signs. Persons charged with the responsibility of noticing and reporting signs of child abuse need not await confirmation of abuse by possible victims who may fear retaliation for revealing the true cause of bruises or other injuries.

While it is true that in cases such as the present one events must be viewed as they were at the time the investigation was initiated, rather than after the investigation was concluded with negative findings, here, the events at the initiation of the investigation were insufficient to meet the "reasonable cause" requirement. See *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989); *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994).

The observations made by Respondent O'Connor were simply insufficient to constitute "reasonable cause." Her observation of young Nicholas Clark gave rise to nothing more than an unparticularized hunch that something might be amiss in Petitioners' family. It was only later, after Petitioners' family was reported to the authorities, that the handprint on Nicholas' brother was recalled (although which brother was affected here and when the observation was made is not clear). In addition, the record is not clear when Respondent O'Connor became aware of the black eye allegedly sustained by Nicholas' brother, Michael.

To further demonstrate the lack of justification for the complaint made by Respondent O'Connor, it should be restated that from the facts of this case, when Respondent O'Connor supposedly reached her "conclusions" that the children in Petitioners' family may have been abused, the children were sent home to the supposedly abusive parents. This last action, that

of sending the Clark children home, demonstrates the baselessness of the complaint made by Respondent O'Connor. If Respondents O'Connor were a "person charged with the responsibility of noticing and reporting signs of child abuse," she certainly forsook her duty, if she was sincere in her suspicions, when she permitted the children to return home.

This permitting of the Clark children to go home is a far cry from "heeding evident warning signs," and "await[ing] confirmation of abuse by possible victims who may fear retaliation for revealing the true cause of bruises or other injuries." Not only did Respondent O'Connor permit the Clark children to be sent home, she waited 24 hours before raising the issue of the child abuse. Clearly, these circumstances render highly dubious Respondent O'Connor's allegations of child abuse on the part of the adult Petitioners. Respondent O'Connor's actions, in this light, were clearly violative of Petitioners' constitutional rights. Compare New York Social Services Law § 413.

At this juncture, another point needs to be made. Respondents were not content to merely make allegations against Petitioners which caused the invasion of their privacy. In addition, Respondents made public the fact that the allegations were made. Within a week of Respondent O'Connor's complaint, the entire community in which Petitioners lived knew of the allegations made against them and accepted their truth at face value. Neighbors became aware of the existence of the allegations, and Petitioners suffered accordingly.

Worse, the allegations made their way to Petitioner Joseph Clark's employment in the Town of Clarkstown Police Department, which caused him to become the subject of an official internal Departmental investigation. Among other indignities, Petitioner Joseph Clark was called before the Chief of Police

and compelled to answer questions concerning the allegations in this case in an official interview. Thus, there was a needless and unnecessary probe of Petitioners' private lives by the Police Department as Petitioner Joseph Clark's employer.

Moreover, Petitioner Joseph Clark's employment, itself, suffered. When he made arrests, attorneys for the persons arrested would cross-examine said Petitioner concerning the child abuse allegations, in attempts to damage Petitioners' credibility. Therefore, the illegal disclosure of the allegations in this case caused Petitioners to suffer severe damages which should have been addressed in the Courts below, which they were not.

Petitioners' constitutionally protected liberty interest arises from two separate sources, the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment on the one hand, and the statutory scheme established by the State of New York to protect the privacy rights of the family on the other. First, Petitioners have a constitutionally protected liberty interest of privacy provided by the Ninth Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution.

Moreover, it is established Constitutional law that a family has a protected liberty interest in its own integrity as a family. This is especially so when allegations arise implicating family members in accusations of child abuse. *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990); *Policard v. Brettschneider*, 1991 WL 87326 (E.D.N.Y.). This protected liberty interest as far as privacy is concerned must be upheld in all except very exceptional cases, where actual instances of abusive behavior exist. See *Emrik v. Chemung County Dept. of Social Serv.*, 911 F.2d 863, 865 (2d Cir. 1990).

Clearly, this protected liberty interest is a "private realm of family life [into] which the State cannot enter." In balancing the individual right with the state interest, a governmental agency in the position of Respondent Clarkstown Central School District must be sensitive to the existence of this "private realm." In *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1944) at p. 161, this Court said the following:

> The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.' *Parham* [*v. J.R. et al.*, 442 U.S. 584 (1979)2] at 603. We have long held that there exists a 'private realm of family life which the state cannot enter.

The individual, or more correctly stated, the individual family is entitled to appropriate treatment by a governmental agency in questions which relate to family relations. Where allegations are made against an individual or an individual family in this context, due process rights of both a substantive and a procedural nature attach to them, which the government may not ignore. See *Emrik v. Chemung County Dept. of Social Serv.*, *supra*.

The Courts below appeared to have accepted the proposition that Petitioners have no liberty interest to be free from unreasonable, arbitrary or unwarranted child abuse investigations. This is clearly in violation of Petitioners' established and constitutionally protected liberty interests, which standing alone, ought cause this Court to grant Petitioners' instant application. *Parham v. J.R. et al.*, 442 U.S. 584 (1979).

Second, Petitioners have a constitutionally protected liberty interest in privacy provided by the New York statutory scheme. In *Hewitt v. Helms*, 459 U.S. 460 (1983), this Court, in recognizing that the states may provide for a statutory scheme in protecting liberty interests in privacy, stated as follows:

> Liberty interests protected by the Fourteenth Amendment may arise from two sources--the Due Process Clause itself *and the laws of the States. Meachum v. Fano*, 427 U.S. 215 at 223-227 (1976).
>
> * * *
>
> [A] State may create a liberty interest protected by the Due Process Clause *through enactment of certain statutory or regulatory measures.* [emphasis added]

Petitioners further submit that there is a New York State statute which requires the reporting of child abuse, New York Social Service Law (SSL) § 413. The section creates a constitutionally protected liberty interest of privacy to be free from arbitrary, unreasonable and unwarranted child abuse investigations. SSL § 413 provides in pertinent part:

> 1. The following persons and officials are required to report or cause a report to be made in accordance with this title when they have *reasonable cause* to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child, or when they have *reasonable cause* to suspect that a child is an abused or maltreated child where the parent, guardian, custodian or other person legally responsible for such child comes before them in their professional or official capacity and states from personal knowledge

> facts conditions or circumstances which, if correct, would render the child an abused or maltreated child. [emphasis added]

New York SSL § 413 clearly requires that "reasonable cause" that a child is an abused exist, prior to a report of suspected child abuse being made. Thus, before a report of suspected child abuse is made, or caused to be made, the objective criteria of "reasonable cause" must be satisfied. In essence, the New York State legislature has statutorily created a liberty right to privacy from child abuse investigations unless there is reasonable cause to invade this privacy. This liberty right is constitutionally protected by the Due Process Clause of the Fourteenth Amendment. The inclusion of a "reasonable cause" requirement in the statute could only have been done, specifically, to protect the liberty right to privacy to be free from arbitrary, unreasonable and unwarranted child abuse investigations.

In *Hall v. Davis*, 424 U.S. 693 (1976), this Court recognized:

> There exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law [footnote omitted], and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status. *Paul v. Davis*, 424 U.S. 693, (1976) at 710-11.

In the record before the Courts below, there was no definitive showing that the action taken by Respondent Clarkstown

Central School District had the prerequisite predicate of "reasonable cause." Petitioners' constitutionally protected liberty right was violated due to an arbitrary, unreasonable and unwarranted report of suspected child abuse by Respondent O'Connor, an employee of Respondent Clarkstown Central School District.

In *Kentucky Department of Corrections v. Thompson, supra*, this Court stated as follows:

> To formulate a claim under the Due Process Clause of the Fourteenth Amendment, a plaintiff must demonstrate that he or she possesses a constitutionally protected interest in life, liberty, or property, and that state action has deprived him or her of that interest. See, U.S. Const. amend. XIV, Section 1. The Supreme Court has established that '[W]e examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient.

Any rational analysis of the record in this case demonstrates that Petitioners had a constitutionally protected liberty interest of privacy to be free from arbitrary, unreasonable and unwarranted child abuse investigations. The initiation of the child abuse investigation by Respondent O'Connor, without an objectively reasonable basis to believe that child abuse had occurred, and, without "reasonable cause" to believe child abuse had occurred, violated those liberty interests of Petitioners without due process of law. In this instance, due process can only be satisfied, if there is an objectively reasonable basis to

believe that child abuse occurred and "reasonable cause" exists to believe that child abuse occurred.

It is undisputed that Respondent O'Connor was the person solely responsible for causing a baseless of suspected child abuse to be made against Respondents. It is also undisputed that this report of suspected child abuse caused Petitioners to be subjected to a child abuse investigation by CPS. Therefore, it would be fair to state that Respondent O'Connor had no "reasonable cause" to believe that a Clark child was an abused child and clearly violated Petitioners' protected liberty interest in being free from arbitrary, unreasonable and unwarranted child abuse investigations, without due process of law. *See Valmonte v. Bane, supra.*

Even a superficial analysis of the record in this case would reveal that even if viewed in a light most favorable to Petitioners, a genuine issue of material fact existed as to whether or not Respondent O'Connor had an objectively reasonable basis to believe that one of Petitioners' children was abused. Furthermore, it is possible that a genuine issue of material fact existed as to whether or not it was clear that the actions she took violated one of Respondents' established constitutional rights.

All of this necessarily meant that the granting of summary judgment to Respondents was quite inappropriate. See *Schering Corp v. Home Insurance Co.*, 712 F.2d 4 (2d Cir. 1983). A rational review of the record in this case would reveal that it cannot be found as a matter of law that Respondent O'Connor had the "reasonable cause" required under New York SSL § 413 to suspect that Petitioners' children were abused within the meaning of the statute.

Moreover, summary judgment was not an appropriate method of resolving the controversy before the Court below where a sufficient quantum of evidence was adduced to establish that there was a direct relationship between the violation of Petitioners' constitutionally protected liberty interests and the policies, procedures and practices of Respondent Clarkstown Central School District.

There were several substantial deficiencies in the policy, procedures and training program on child abuse identification and reporting employed by Respondent School District. These included the following:

1. There was a complete omission of the requirement that the district employee making the report must have an objectively reasonable basis to make such a report.
2. There was a complete omission of any reference to the individual's clearly established right to be free from invasions of privacy due to arbitrary, unreasonable and unwarranted child abuse investigations.
3. There was a complete omission of any reference to the individual's clearly established right to be free from invasions of privacy due to child abuse investigations unless there was "reasonable cause" to suspect child abuse.
4. There was a complete omission of any definition of the concept of "reasonable cause" as it was required to exist prior to a report of suspected child abuse to Respondent Clarkstown Central School District.

In fact, the very term "reasonable cause" is mentioned in only two places within the policy, procedures and training program on child abuse identification and reporting. The first place where the term "reasonable cause" is mentioned, is within an

appendix of the New York State Syllabus, where an actual copy of New York Social Service Law (SSL), Section 413, is provided. There exists no further explanation or definition of the term aside from its mere mention within the statute, in its inchoate form.

The second place where the term "reasonable cause" is a mere passing reference within the policy document. There, the term is again mentioned without any further explanation. Therefore, it becomes apparent that the documents generated by Respondent Clarkstown Central School District fail to instruct, let alone emphasize, that in the absence of an objectively reasonable basis, or in the absence of "reasonable cause", a family's right to privacy is protected by statute and the Constitution.

It can fairly be said that it is the policy, procedure and practice of the Respondent School District to omit instructing its employees on the constitutionally protected liberty interests that are implicated in situations that may require a report of suspected child abuse. It is also fair to say that the policy, procedure and practice of Respondent School District in failing to instruct its employees on the aforesaid constitutionally protected liberty interest resulted in the complained of constitutional violations.

A municipality or municipal agency may be held liable pursuant to 42 U.S.C. § 1983 for action caused by an official agency policy or practice which resulted in the violation of a plaintiff's constitutional rights. *Monell v. Department of Social Service*, 436 U.S. 658, 691-94, (1978); *Hodge v. Ruperto*, 739 F.Supp. 873 (S.D.N.Y. 1990). A municipality may also be liable under § 1983 due to its failure to train its subordinates if the need for further training is "obvious" to prevent constitutional violations. *Canton v. Harris*, 489 U.S. 378 (1989).

In addition, liability under § 1983 may be found where there is a policy of deliberate indifference to the constitutional rights of persons within its domain. *Fiacco v. City Rensselaer*, 783 F. 2d 319 (2nd Cir. 1986). A policy that permits or tolerates unconstitutional acts by municipal employees can form a basis for municipal liability under §1983. *Fiacco*, at 326-327. As shown above, Respondent School District, in promulgating its policy, procedure and training in child abuse identification and reporting was clearly deficient in that said Respondent completely omitted any training in the protected constitutional liberty interest that might be implicated in child abuse identification and reporting.

Finally, it is submitted that the Courts below erred in granting and affirming summary judgment against Petitioners where there was a genuine issue of material fact which should have been submitted to a jury, namely, that whether Respondent O'Connor's report was the result of willful misconduct and/or gross negligence. If the trial jury were to have found this, such a finding would have precluded, as a matter of law, the presumption of good faith and consequent immunity from civil liability provided by New York Social Services law § 419. *Satler v. Larsen*, 131 A.D.2d 125 (2d Dept. 1987).

However, this immunity only comes into effect if the civil liability did not result from intentional misconduct or gross negligence. SSL § 419; *Rossignol v. Silvernail*, 185 A.D.2d 497 (3d Dept. 1992). In this case, there is ample evidence to demonstrate that the report of suspected child abuse made by Respondent O'Connor was either willful misconduct and/or gross negligence. The state of the record below demonstrated that the actual making of the report of suspected child abuse by Respondent O'Connor was not predicated upon "reasonable

cause." Compare *Thomas v. Beth Israel Hospital Inc.*, 710 F. Supp. 935 (S.D.N.Y. 1989).

Indeed, a rational analysis of the facts as they existed before the District Court below, would reveal that Respondent O'Connor, in making a report of suspected child abuse, supposedly by Petitioners, was not based upon information which was objectively reasonable. Thus, her actions were objectively unreasonable and amounted to willful misconduct and/or gross negligence. Contrast, *Kempster v. Child Protective Services of Suffolk Co.*, 130 A.D.2d 623 (2d Dept. 1987).

In addition, Respondent O'Connor's actions, in making the complaint against the Petitioners, gross violations of the identification and reporting procedures by Respondent School District occurred. This, in and of itself, constituted either gross negligence and/or willful misconduct on the part of Respondent O'Connor. Compare *Viscaino v. City of New York*, 150 A.D.2d 312 (1st Dept. 1989).

Based on all of the above, it is submitted that this Court should grant the present application. Clear error was committed by the Courts below, and the error which was thus created serves to create a disharmony in the body of law as it pertains to constitutional rights to privacy and the freedom to be spared unreasonable and unwarranted governmental investigations.

Conclusion

For the reasons stated above, it is respectfully requested that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A—Order of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of October, one thousand nine hundred and ninety-five.

Present:

Honorable Ralph K. Winter,
Honorable Dennis G. Jacobs,
Honorable Pierre N. Leval,
Circuit Judges.

ROSEANN CLARK, JOSEPH CLARK, and infant NICHOLAS CLARK and MICHAEL CLARK, by their mother Roseann Clark,

Plaintiffs-Appellants,

v.

CLARKSTOWN CENTRAL SCHOOL DISTRICT,

Defendant-Third-Party-Plaintiff-Appellee,

HELEN O'CONNOR, individually and in her official capacity as an employee of the Clarkstown Central School District,

Defendant-Appellee,

ARCHDIOCESE OF NEW YORK, ST. AUGUSTINE SCHOOL, and HELEN BOYCHAK, as principal of St. Augustine School, and as an employee of the Archdiocese of New York,

Third-Party-Defendants-Appellees,

STATE OF NEW YORK, COUNTY OF ROCKLAND, DEPARTMENT OF SOCIAL SERVICES, and CHILD PROTECTIVE SERVICES,

Third-Party-Defendants.

ORDER
#95-7238

Appeal from the United States District Court for the Southern District of New York.

This cause came to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Various members of the Clark family appeal from Judge Brieant's grant of summary judgment and dismissal of their complaint alleging violations of 18 U.S.C. § 1983 and related state claims. On appeal, they argue, *inter alia,* that they had a constitutionally protected privacy interest under the Ninth and Fourteenth Amendments to be free from a child abuse investigation initiated or conducted by various appellees. Appellants also argue that the district court erred as a matter of law in finding that appellees had "reasonable cause" to suspect that the Clark children were being abused.

We review a district court's grant of summary judgment *de novo*, viewing all evidence in the light most favorable to the party opposing the motion. *United States v. Articles of Banned Hazardous Substances,* 34 F.3d 91, 96 (2d Cir. 1994) (citation omitted). Summary judgment may be granted only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323 (1986). "A dispute regarding a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *Keywell Corp. v. Weinstein,* 33 F.3d 159, 163 (2d Cir. 1994) (quoting *Anderson v. Liberty Lobby, Inc.,*477 U.S. 242, 248 (1986)).

We may assume that appellants are correct that they have a constitutionally protected liberty interest to be free from child abuse investigations absent "reasonable cause" to believe that a child is being abused. We nevertheless believe that O'Connor had reasonable cause to report her suspicions of child abuse to her immediate supervisor, appellee Boychak, who then had similar cause to pass on the report to third-party defendant Child Protective Services.

According to the appellant's version of the facts, on or about September 16, 1991, O'Connor, a nurse at St. Augustine School, questioned Nicholas Clark, a student at that school, about his

black eye. O'Connor seemed to recall that Michael, another of the Clark children, had a black eye on April 4 of the same year. She also remembered that on or about June 21 of that year, Michael's teacher had told her that Michael had a handprint on his face. Based on these observations and recollections, O'Connor reported her suspicions of child abuse to appellee Boychak. After speaking separately to the two children—conversations that yielded no evidence of child abuse—Boychak made an official report of child abuse to Child Protective Services.

Drawing all favorable inferences in favor of the appellants, we cannot say that this conduct was unreasonable. The events must be viewed at the time the investigation was initiated, not after the negative results of the investigation were known. Had an investigation not been undertaken and actual abuse followed, appellees would have received justifiable criticism, if not a lawsuit, for not heeding evident warning signs. Persons charged with the responsibility of noticing and reporting signs of child abuse need not await confirmation of abuse by possible victims who may fear retaliation for revealing the true cause of bruises or other injuries.

Because appellees' actions did not violate appellants' constitutional rights, the district court properly granted summary judgment, and we need not address appellants' remaining arguments.

We therefore affirm.

s/Ralph K. Winter
Hon Ralph K. Winter, U.S.C.J.

s/Dennis G. Jacobs
Hon. Dennis G. Jacobs, U.S.C.J.

s/Pierre N. Leval
Hon. Pierre N. Leval, U.S.C.J.

United States Court of Appeals
Second Circuit
Filed Oct 13 1995
George Lange III, Clerk

APPENDIX B—Order of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Roseann Clark and Joseph Clark, and infant Nicholas Clark and Michael Clark, by their mother Roseann Clark,

Plaintiffs,

against

Clarkstown Central School District and Helen O'Connor, individually and in her official capacity as an employee of the Clarkstown Central School District,

Defendants.

Clarkstown Central School District,

Third Party Plaintiff,

against

Archdiocese of New York, St. Augustine School, Helen Boychak as Principal of St. Augustine School, and as an employee of the Archdiocese of New York, and State of New York, County of Rockland, Department of Social Services, Child Protective Services,

Third Party Defendants.

92 CIVIL 9015 (CLB)
JUDGMENT

Whereas the above entitled action having been assigned to the Honorable Charles L. Brieant, U.S.D.J., and the Court thereafter on January 27, 1995, having handed down its oral order, granting defendants' motion for summary judgment, and dismissing all federal claims against all remaining defendants and third part defendants with prejudice and dismissing the pendent state claims against these defendants and third party defendants without prejudice, and denying defendant Helen O'Connor's motion for sanctions, it is,

ORDERED, ADJUDGED AND DECREED: That all federal claims against all remaining defendants be and hereby are dismissed with prejudice, and it is further,

ORDERED, ADJUDGED AND DECREED: That the pendent state claims against these defendants be and hereby are dismissed without prejudice.

Dated: White Plains, New York
January 31, 1995

s/James M. Parkeson
Clerk